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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6805

PATRICK D. GEARIN,

Petitioner,

vs.

WEYERHAEUSER LINE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TO THE CHIEF JUSTICE and the ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner PATRICK D. GEARIN, plaintiff below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 21, 1974, (Petition for Rehearing denied on March 11, 1974).

OPINIONS BELOW

The judgment and order of the District Court is not officially reported but is reproduced in Appendix A attached hereto.

The opinion of the Court of Appeals is not officially reported but is reproduced in Appendix B attached hereto.

JURISDICTION

The petitioner in this case is an American seaman who is seeking enforcement of those basic statutory rights which were created to ensure to seamen that they will receive all of their earned wages in timely manner. These statutes were enacted as the Shipping Commissioners Act of June, 1872 and are designated today as TIT. 46 U.S.C., Sections 542a through 713 (Merchant Seamen).

The benefits provided by these laws were denied to the petitioner by the District Court in San Francisco, California, on August 27, 1971, when he sought judicial relief from six different withholdings of his wages by his employer.

The Ninth Circuit Court of Appeals, on January 21, 1974, affirmed the judgment below with the exception of one claim. A copy of the Memorandum opinion appears in the Appendix to this petition.

A Petition for Rehearing was duly filed on February 4, 1974. A copy appears in the Appendix to this petition. It was denied by the Court on March 11, 1974.

QUESTIONS PRESENTED

1. Is the lower court's concept of "stoppage of wages," which permits withholding a seaman's wages without complying with the statutes, valid?

2. Can a seaman's wages be withheld by the shipowner to repay itself for providing the seaman with room and meals ashore when the seaman, at the time, was disabled from work as a result of his service in the vessel?

3. Can a seaman's wages be withheld for any purpose when no entry is made in the Official Log with reference to such withholding?

4. When a master forfeits a seaman's wages for a Section 701 offense and when the Coast Guard prosecutes the seaman for that offense and finds that the offense did not occur and that the log entry supporting the forfeiture is illegal, does the shipowner--when no appeal was taken from the Coast Guard decision--have a right to retain the forfeited wages?

5. When a wage deduction has been shown to be illegal, what remains by way of proof by either party to determine whether or not the Section 596 penalty should be enforced?

A. Is the proof of illegality decisive, or is it a mere condition precedent which permits the seaman to proceed with further proofs?

B. Must the seaman also prove that the master's conduct was "arbitrary, willful or unreasonable," or is the burden on the shipowner to prove that "sufficient cause" existed for the withholding despite its illegality?

C. Does the word "neglects" as used in Section 596 possess its usual and ordinary meaning?

6. Is the Court below correct in stating that, where a wage withholding has been found illegal, sufficient cause for having made it can be established and the penalty avoided if the master merely testifies that he believed in good faith that the withholding was justified?

7. When a seaman has renounced his employment contract with a vessel, either with or without justification, and has refused to sail with it, does he remain obligated to perform orders of its master?

Can his refusal to obey orders of the master following his renunciation of his employment be punished by the forfeiture of wages?

8. Under what conditions is a seaman entitled to quit his vessel to seek medical care?

9. Can a seaman's wages be withheld by the shipowner for disobedience in port of an order issued in port? What is the meaning of the words "at sea" appearing in Section 701 Fourth and 701 Fifth?

10. Can a disabled seaman who quit his service in a vessel to seek necessary medical care be punished by forfeiture of his wages, either earned or unearned?

11. When a withholding of wages is not one of those permitted by statute, is a court justified in simply declaring it to be legal, without rationale or discussion to explain the inconsistency with the statutes, or does it have a duty to inform the plaintiff

and others of its elementary reasoning?

12. Does the decision of the Court below distort in part and deny in part the teaching of Isbrandtsen v. Johnson, 72 S.Ct. 1011, 343 U.S. 779

13. When a seaman sues in the District Court on several claims, and a jury awards him $2,000.00 on one of them, is he not, in the absence of any stated reason for making an exception to Rule 54 (F.R.C.P.) entitled to his costs as the prevailing party?

14. When the Court of Appeals reverses with respect to one of the claims which was decided against the appellant below, is he not, in the absence of any stated reason for making an exception to Rule 39 (Rules of App. Proc.), entitled to his costs, both in the District Court and the Appellate Court, as the prevailing party?

15. Is the official record of a seaman's prosecution before a U.S. Coast Guard Examiner for a Section 701 offense, which resulted in a decision from which no appeal was taken, admissible in the District Court? Is the aforesaid decision of the Examiner binding on the District Court on the question of the seaman's guilt or innocence of the specific statutory offense for which he was prosecuted in the Coast Guard proceeding?

16. When the double-wage penalty is running, what will stop it?

Is the rule that was laid down in Gerber v. Spencer, 278 F.886 (N.D. Cal. 1922) and followed in Forster v. Oro Navigation Co., 128 F.Supp. 113 (S.D.N.Y. 1954), requiring the payment of the wages

originally owed and the accrued penalties to date, the correct rule?

17. Can a seaman be denied his earned wages on any grounds if the log entry making the deduction: 1) was entered in the Official Log after his official discharge from the Shipping Articles by a consular officer; 2) the log entry was never made known to him?

STATUTES INVOLVED

The statutory provisions involved are TIT. 46, U.S.C. Sections 201, 596, 597, 599, 600, 601, 602, 659, 670, 701, 702, 706 and 707.

STATEMENT OF THE CASE

Factual Resume:

On December 14, 1967, petitioner signed articles as ordinary seaman aboard the defendant's vessel, SS C.R. Musser, for a voyage to Vietnam and return. The ship departed from Portland, Oregon, for Da Nang, Vietnam, on December 20, 1967.

After three days at sea, the petitioner slipped on a ladder and suffered an injury to his ankle which totally disabled him from work (as events proved, until the following May).

The master in his official records stated his belief that petitioner had suffered broken metatarsal bones in the accident. Nonetheless, although the vessel had no doctor or x-ray, and passed close to Midway Island with its hospital facilities and a tug ready to take off seamen, the master carried the petitioner for 27 days to Vietnam. During this time

he denied petitioner the use of the hospital, which was empty, and denied that the ship had crutches aboard, a statement later refuted by deposition testimony of the chief steward and another crew member. Evidence at the trial disclosed that the only use made of the hospital during the entire voyage, except for the first night of the petitioner's disablement, was as a jail. The room ordinarily used as a jail on Liberty ships was filled with ship's stores.

Twenty-seven days after the accident, on January 19, 1968, the vessel arrived at Da Nang, Vietnam. Here the petitioner received his first professional care, at a United States Navy Clinic, where his leg was placed in a cast and he was supplied with crutches. The company's agent put him in a hotel ashore, awaiting the master's approval to repatriate him for medical care.

The master refused the repatriation request and petitioner of necessity stayed in Da Nang, wearing his cast and using crutches, during the period (15 days) that the vessel unloaded its cargo.

The master ordered the petitioner during this time to report aboard the vessel, anchored several miles out, every morning. Because of his belief that compliance with the order would expose him to unnecessary danger in his crippled condition, the petitioner, after one trip, refused to comply further. At the trial, petitioner put on the stand another member of the crew who was an eye-witness to an accident on petitioner's ship during this period wherein a young, fit sailor was crushed to death in the act of transferring from the ship's gangway to a bouncing launch, under the

same circumstances that petitioner was ordered to cope with twice every day while wearing a leg cast. The trial judge refused to allow the evidence in for the reason that petitioner's refusal had started before this accident occurred, and therefore petitioner's decision was made without this knowledge of the proof of how right he was.

Petitioner sought the aid of the U. S. Consul in his attempts to be repatriated for medical treatment, but was unsuccessful. It is undisputed that air transportation from Da Nang to the United States was available during the early part of the vessel's stay. The Tet offensive broke out about seven days after the vessel's arrival, and this caused the Navy's medical facility to be overwhelmed with battle casualties and made it impossible for petitioner to receive further care for his own injury.

The vessel departed Da Nang with the petitioner aboard on February 3, 1968, and arrived at Hong Kong three days later, where it lay at anchor to receive bunkers.

Here petitioner's cast was removed and his injury was examined by a British doctor, this being the second examination by a competent person since the accident 46 days before. This doctor, in his report to the vessel, noted that he had found a chip fracture which had not been discovered at Da Nang, but which was uniting satisfactorily. He put petitioner's leg in a crepe bandage, advised continuing the use of crutches, and declared him "not fit for duty."

At this point, petitioner refused to return to the anchored ship and allowed it to depart without him for Okinawa, which it did after staying only eight hours in Hong Kong.

Petitioner appealed to the vessel's agents in Hong Kong to send him to the United States for medical care, but they provided him instead with air passage to Naha, Okinawa, where he arrived on February 9, before the vessel.

Petitioner reported to the company's agent in Naha, who promptly arranged for him to receive medical attention. On February 10, the American Clinic at Naha put petitioner's leg back into a plaster cast and continued his "not fit for duty" status. The treating doctor at said clinic recommended that petitioner be repatriated at once for medical reasons. The agent procured authority from the U. S. office of the company and made the necessary arrangements to do so. The petitioner was provided with a hotel room and subsistence while he awaited repatriation.

When the vessel arrived at Naha on February 11, the master was informed that arrangements had been completed to repatriate the petitioner on February 15, and that petitioner would need his shot records (carried on the vessel) to avoid additional, unnecessary inoculations. The master testified that he did not feel that repatriation was warranted, and regarded the whole business as evidence of corruption whereby the company's local agent worked collusively with the local doctors to "ramrod" seamen out through the travel agency which the vessel's agent also operated, for the sake of the commissions involved.

The evening before petitioner's scheduled departure, after the master had been informed by the agent that petitioner would be calling for his shot records, the petitioner visited the vessel and asked the master for his shot records. Although they

were the property of the petitioner, the master refused them. (As a result, the petitioner was required to submit to unneeded shots the next morning in order to leave for the United States.) The petitioner then asked for some of his accrued wages. The master refused, and in his written notes describes that he told the petitioner that at that moment he was in debt to the vessel. (The master's own Wage Voucher, prepared the next day, shows that petitioner had owing to him, at the time he asked for some of his wages, the sum of $482.00 in undisputed earned wages after all deductions.)

At this final meeting, although the master knew the petitioner was scheduled to be repatriated the following day, he did not make the loggings and wage forfeitures with which this suit is concerned. As shown by his own admission and the face of the records themselves, he made them at 3:00 p.m. on the day following, after the seaman had been started for home. Petitioner never heard the entries read, was never given an opportunity to reply, and was never provided with copies of them. Petitioner did not know that following his departure from Okinawa, almost all of his wages earned during the voyage had been forfeited by the master. He learned this when he asked for his pay in San Francisco on March 14, 1968, at which time he was paid off with $64.42 of the $482.96 which was due him.

The petitioner was discharged from the Ship's Articles by the U.S. Vice-Consul in Naha on February 15. The official certificate shows the reason to be repatriation for medical care. Petitioner was flown home at the company's expense and was paid his unearned wages till the voyage ended (March 14, 1968).

On his arrival in the United States, petitioner was hospitalized at the U.S. Public Health Service Hospital in San Francisco for a period of nine days. Following this, he was treated as an outpatient until May 15, 1968. On that date he was declared fit for duty for the first time since his accident on December 23, 1967.

After his release from the hospital, petitioner was charged by the U.S. Coast Guard with Failure to Join his vessel at Hong Kong. This charge was based upon an entry made in the Official Logbook by the master shortly after the petitioner had been officially discharged from the Articles by the Consul in Okinawa for medical reasons.

At the hearing, the Examiner ruled that the series of log entries concerning petitioner were all illegal. They did not even suggest that he had been injured. The Examiner called the log entries "one-sided" and "the kind the statute was intended to prevent." The charge of Fail to Join, made by the master, was dismissed. The shipowner, however, refused all demands thereafter to return any part of the earned wages which it had taken from the seaman on the basis of the master's unilateral loggings.

* * * *

The suit underlying this petition was filed on September 18, 1968. The petitioner originally asserted nine separate claims. These are fleetingly reviewed here for background.

1. The petitioner claimed damages resulting from negligence and unseaworthiness of the vessel, and the jury denied this claim. No appeal was taken from this verdict. The matter was adjudged.

2. The petitioner claimed damages for the vessel's failure and refusal to provide him with necessary medical care. The jury awarded two thousand dollars on this claim and no appeal was taken by either side. The matter is adjudged.

3. The petitioner claimed damages for the master's malicious instigation of a U.S. Coast Guard prosecution for Failure to Join. The jury denied damages and this verdict was appealed by the seaman. The Ninth Circuit Court affirmed and that claim is hereby waived.

4. - 9. The seaman demanded restoration of all illegally withheld wages (all but $64.42 of his voyage pay was retained by the shipowner) and the waiting-time penalty provided in TIT. 46 U.S.C. Section 596. Six separate wage withholdings were involved. Counsel for the parties stipulated that the wage claims could be decided by the Court without the jury. All six of the seaman's claims were denied by the District Court on the ground that every withholding was legal. These six wage claims are the only claims with which this petition is concerned; all other claims have been finally adjudged or are now waived.

THE WAGE CLAIMS AT ISSUE

First Claim: It is undisputed that the shipowner withheld a portion of the petitioner's wages in Da Nang, Vietnam, for the specific purpose of recouping money spent by its agent in providing maintenance ashore for petitioner, a crewmember, at a time when he was admittedly disabled from work as a result of his service in the vessel. No log entry was made concerning this withholding. Petitioner's counsel was unaware that it had occurred until shipowner's counsel proved the facts

at the trial. The District Court categorically declared this withholding to be legal, and the Appellate Court affirmed without referring to this claim at all.

Second Claim: It is undisputed that the shipowner withheld a portion of the petitioner's earned wages for the purpose of recouping money spent by its Hong Kong agents in providing maintenance and transportation to the seaman at a time when he was admittedly disabled from work as a result of his service in the vessel.

Despite the shipowner's written admission that this withholding was illegal, filed with the Court fifteen months after suit was filed, the trial judge ruled that this withholding, too, was legal. The Appellate Court reversed, agreeing with the parties that the taking was illegal, but it found that no penalty was called for, since the shipowner had acted "with sufficient cause" in taking a disabled seaman's wages for costs of his maintenance and cure and in refusing to return the wages in the face of repeated demands, supported by citations of statutes and case law, for a period of more than fifteen months.

Third Claim: It is undisputed that the shipowner is withholding a portion of petitioner's earned wages for the purpose of punishing petitioner's conduct for refusing to sail in the vessel from Hong Kong.

This forfeiture was based upon the alleged offense of Fail to Join (Section 701 Second). The master's log entry which forfeits these wages states: "For failing to join vessel in Hong Kong . . . " The Shipping Articles show: "Cause of Leaving Ship - Fail to Join."

Petitioner contends he was compelled to leave the vessel in Hong Kong to procure needed medical care and that every act and opinion by professionals thereafter proved he was justified in resorting to this ancient right of seamen. The jury's finding confirmed it as well. These facts show that the wage forfeiture imposed for Fail to Join was illegal. In this contention the petitioner is joined by the U.S. Coast Guard which ruled after a formal hearing that this offense had not occurred, making any wage forfeiture based upon it illegal.

Section 701 limits the punishment which can be inflicted for Fail to Join to two days' wages. Petitioner contends this sum is being presently withheld on a false charge of misconduct.

Fourth Claim: It is undisputed that the master retained nine days' wages to punish the seaman for the alleged Failure to Join described above. Section 701 Second clearly limits the punishment for that offense to two days' pay or to the amount spent by the vessel in hiring a substitute. The master testified that no substitute was hired. Therefore, even assuming that the charged offense occurred, the forfeiture of nine days' wages was in excess of the amount allowed, and seven days' wages were taken and are being retained today without any justification in law.

Fifth Claim: It is undisputed that the shipowner is withholding a portion of the petitioner's earned wages to punish him for his alleged commission of the offense described in Section 701 Fourth: "For willful disobedience to any lawful command at sea."

It is undisputed that the order that was disobeyed had been given in port, and by its very nature required the vessel to be in port for the order to be applicable. (The disabled seaman, living ashore in a room provided by the agent, was ordered to report aboard the ship every morning to establish that he "was still alive" in the troubled city of Da Nang. Such an order would be completely meaningless with the vessel at sea.)

The conduct cited as "disobedience of a lawful command at sea" occurred two weeks later in a peaceful American port, at a time (February 13 and 14, 1968) when the seaman was living in a hotel awaiting repatriation for medical care, and the vessel was tied to a dock. However, the trial judge declared that the wage forfeiture of "two for one"for disobedience to "a lawful command at sea," was legal. The Appellate Court affirmed.

Sixth Claim: It is undisputed that the shipowner is withholding a portion of petitioner's earned wages to punish him for his alleged commission of the offense described in Section 701 Fifth: "For continued willful disobedience to lawful command . . . at sea."

It is undisputed that the same in-port order was involved in this forfeiture as in that above, and that the conduct cited as disobedience occurred two weeks later in a peaceful American port, on the day (February 15, 1968) following the first alleged offense. It is also undisputed that this second alleged disobedience for which four days' wages were taken, occurred on the same day that the seamen was repatriated by air, early in the day, for hospitalization in the

United States. Before his departure that morning, he had been compelled to spend time submitting to unneeded shots which would not have been required if he had been given his shot records by the master when he requested them the night before.

The trial judge declared that the forfeiture of four days' pay for this day's "disobedience to a lawful command at sea" was legal and the Appellate Court affirmed. The words in the statute restricting the offense to orders and acts performed at sea were denied any significance. The fact that the seaman's entire program had been arranged by another agent of the company was ignored. The fact that the seaman had forcefully and demonstrably terminated his employment contract with the vessel at Hong Kong was not considered by the courts in weighing the legality of these punishments for refusing to obey orders by his former employer.

It is undisputed that all of the foregoing wage forfeitures were based upon one block of entries in the Official Logbook, occupying half a page, which show on their face that they were all made at 3:00 p.m. on the day the petitioner left the Far East for home, and that he never saw them. This fact alone makes them all illegal. No compliance with Section 702 is suggested. The law is clear that no illegal log entry will support a forfeiture of wages, even where the misconduct charged has been proven.

It is undisputed that the U. S. Coast Guard Examiner, after a formal inquiry and hearing, declared that all of the log entries involved in the forfeitures were illegal. This Coast Guard ruling was never appealed by the shipowner. Its res judicata effect under the Administrative

Procedures Act,(TIT. 5, U.S.C. Admin. Proced. Act.) was totally rejected by both Courts.

REASONS FOR GRANTING THE WRIT

1. The decision below creates a new legal basis for withholding a seaman's wages which lies outside the statutes. It is labeled "stoppage of wages." It declares that a master can simply stop the accrual of a seaman's wages as distinguished from forfeiting them after they are earned. In the present case when the seaman did not sail with his vessel from Hong Kong, the master charged the petitioner in the Official Log and on the Shipping Articles with being a "Fail to Join" and he encouraged the U.S. Coast Guard to prosecute the seaman for that offense. He logged the seaman nine days' wages to punish that offense. Several years later on his deposition, when he had become a property manager ashore, and after petitioner's motion for summary judgment had pointed out the excessiveness of the penalty for the Fail to Join charge, the master expounded the new theory of "stoppage." He declared that the withholding of nine days' wages as a result of the offense charged was not intended to be a punishment for the statutory offense listed in 701 Second--which permits taking only two days' wages--it was merely that he stopped the wages, hence they were not earned, hence they were not forfeited, hence the nonpayment of nine days' wages was legal as a form of discipline outside Section 701.

It is plain that this is merely a one-for-one forfeiture which is free of the safeguards established by the law for the protection of seamen.

This theory asserts that an option

is presented to the master of treating certain specific conduct which constitutes a Section 701 offense as either a statutory offense or as a non-offense which can result in a wage loss to the seaman and a windfall to the employer several times greater than is permitted if it is treated as a statutory offense.

Besides being inconsistent with the established law, the stoppage theory is refuted by the facts in the present case.

a. The ship's Pay Voucher shows that the seaman's total wages for purposes of computing income tax and other withholdings includes the nine days in question, and the standard deductions from petitioner's pay for those nine days were taken.

b. If such an option as that asserted ever existed, the master chose to enforce the statutory offense at the time and cannot be heard, years afterward, to say that he selects the stoppage theory. Nonetheless, the "stoppage of wages" argument was approved and applied below, and the shipowner is being allowed to keep those wages today.

2. The decision below introduces a new rule for determining the question of "sufficient cause" which reduces to a sham the entire statutory system which Congress has created to protect seamen's wages. This rule requires only that the master assert, when a wage withholding has been found to be illegal, that he possessed an honest belief at the time he made the illegal forfeiture that he was justified in doing it.

It is hardly realistic to expect a master to refrain from making an oral assertion which is incapable of being disproved when it so well serves his employer's purposes and his own. For practical purposes,

this rule abolishes the double-wage penalty as a deterrent to illegal wage seizures.

In the present case this "honest, mistaken belief" rule has been applied to excuse taking a disabled seaman's wages to provide him with food and quarters ashore, expenses which would never have been chargeable against wages, even under the harsh rules of the general maritime law which preceded the present statutes.

3. The decision below ignores the taking of a disabled seaman's wages to pay for his own maintenance--and doing so without any log entry.

The shipowner proved at the trial that some of the petitioner's wages were withheld by the master in Da Nang, Vietnam (before Hong Kong). The master testified that these were taken by him and forwarded to the local agent to reimburse the company for the expenses of providing the petitioner with food and quarters ashore. The petitioner at the time was wearing a cast and using crutches as the result of an accident suffered in the vessel. There is absolutely no dispute concerning these facts.

The law is clear that this recoupment was illegal and could never be regarded as otherwise. The seaman is entitled to restitution and the double-wage penalty for this claim as much as for the others. Yet this claim which was vigorously asserted by the seaman, is not even commented upon or referred to in the decision below.

5. The decision below emasculates an administrative ruling of the U.S. Coast Guard in respect to a matter which that agency is specifically empowered by statute to administer.

When a master accuses, tries and punishes a seaman for an offense, he is not acting without certain personal interests. For one, his employer profits by keeping wages forfeited. Two, the master is unavoidably an adverse party with respect to the charge of misconduct.

When the U.S. Coast Guard later prosecutes for the same offense, the hearing is one within the fair-play concepts of "due process." The judgment reached is certainly more deserving of judicial recognition than the master's personal ukase, and the law provides that it shall be (Adm. Proced. Act).

In the present case, the Court below accorded greater authority to the master's private acts and conclusions than to the official decision of a Coast Guard Examiner following a formal hearing.

5. The decision below approves the enforcement of five different wage withholdings, not one of which rests on a log entry made in compliance with the statutes. One of them is not evidenced by any log entry at all. Four are supported in the Official Logbook by entries which show that they were made after the seaman had been discharged from the Shipping Articles. It is undisputed that they were not read to the seaman, that he was not given a copy, that he was not allowed to reply, and that he was not even made aware of their existence. It is also undisputed that the seaman presented himself on the vessel the evening before his discharge and that ample opportunity existed for the statutory requirements to have been complied with.

The logging requirements of Section 702 constitute a vital safeguard for seamen

against arbitrary and tyrannical wage forfeitures. For these requirements to be totally ignored, by a master who both acquiesced and demonstrated that he knew them, was a serious breach of the seaman's rights which the District Court and Appellate Court have chosen to disregard.

* * * *

It is possible that the decision below goes further than any single decision in the federal reports in converting essential, living rights of seamen into ink on paper. There is serious need for this Court to do again what it did in Isbrandtsen more than twenty years ago, to clarify and confirm the law in this important area. There will always be those who seek to diminish the rights of seamen and there will, naturally, be courts that sympathize with their efforts.

It is not surprising, therefore, that disputes develop under the adversary system. But when two courts have ruled that the double-wage penalty can be received only after a seaman has met the burden of proving the state of a master's mind while he was violating the statutes; log entries are no longer required to comply with the statute and, in fact, are not required at all; mere claims of debt can be satisfied unilaterally by a shipowner out of wages despite the fact that the statutes do not allow even a marshal with a court's decree to levy on them; then it is correct to say that the Courts below have abrogated the statutes and restored the general maritime law--and a fresh declaration of the law by this Court is urgently needed.

CONCLUSION

The statutes of 1872, at the time they were enacted, made seamen a favored class over the other working members of our society. The protection afforded seamen's wages was equally needed ashore, where employers engaged in the same practice of "docking" the wages of employees on various pretexts. Actually, the abrogation of the general maritime law and adoption of the 1872 statutes merely conferred upon seamen their basic constitutional right to due process before having their wages taken.

In the century that has passed since, the terrestrial workers have improved their condition by collective bargaining practices and legislation to a point that far surpasses the seamen's. Citizens of all walks of life have shared in the new advances. Recent years have seen the end of artisan's liens, banker's liens, prejudgment attachments, and numerous other violations of property rights which have gone uncorrected, often unchallenged, over the years.

It is a rare crane operator, assembly-line worker, or truck driver who must submit--today--to procedures diminishing his individual rights to property and freedom that the seaman routinely, and necessarily, still accepts.

Yet the view persists that the seaman enjoys unjustifiably-favorable rights under the "modern" statutes of 1872. And there is a strong tendency on the part of many, including some courts, to regard the statutes as archaic and unwarranted in view of the power of maritime unions.

This view is given expression in the Court of Appeals decision in Arguelles v. U.S. Bulk Carriers, 408 F.2d 1065, where the Chief Judge (dissenting) wrote:

> ". . . collective bargaining agreements now bar the return of the harsh practices of the Eighteenth Century. The collective bargaining agreement and the maritime union stand as protection to the seamen, guarding against overreaching by the employer."

This notion that the seamen's unions make protective legislation unnecessary is a dangerous fallacy. The key to understanding this is succinctly stated in this Court's opinion in the same case (Arguelles, supra):

> "Maritime unions, of course, like other unions, gain "prestige" by processing grievance claims. (Citation.) And employer interests are served "by limiting the choice of remedies available to aggrieved employees"."

Ordinary observation discloses that maritime unions "hang the hook" or "close the port" when issues in dispute affect the union as an organization. A dispute over whether or not certain work is "overtime" will receive sharp union attention; a dispute as to whether or not an individual was paid in full for overtime claimed is a lesser issue; and a dispute concerned with the legality of forfeitures of wages for misconduct--raising questions concerning individual statutory rights--will often receive no attention, unless the claimant enjoys a special relationship with the officials of the union or, in some cases,

pays for the help he needs. F.N.(a),(b)

The seaman must still submit to a variety of prejudgment wage seizures based upon the unilateral decision of his employer (who is permitted to keep the money involved). He must still defend against hearsay which is admissible in the courts, and which operates as prima facie evidence against him, because his absent adversary wrote it in the Official Logbook.

Petitioner believes that the federal statutes and the various labor codes in the several states which govern terrestrial workers and their employers have no equivalent for these procedures; yet they usually provide a wage-penalty for failure or neglect to pay earned wages promptly--the very benefit which so many courts find difficult to enforce in favor of a seaman whose nomadic existence makes this right particularly important to him.

The continued existence and enforcement of the protective statutes are as vital today as they ever were to protect seamen as individuals. And the enforcement of the double-wage award is the only thing that makes the entire remedial scheme effective. Without it, shipowners can freely seize wages since the vast majority

F.N.(a). A news item, attached as"Appendix F" provides a fresh illustration of the fact that individual seamen's rights which have no significance for their unions are frequently slighted.

F.N.(b). It is noteworthy that the amicus curiae in this petition is not the petitioner's union. That organization stated that it preferred to handle claims like the petitioner's "in its own way."

of abuses will go unchallenged, and in those rare cases when a successful challenge is made, if the only requirement, after years of litigation, is to restore the wages that were owed at the vessel's payoff, then the general maritime law, with all its harshness, will have returned.

Respectfully submitted,

Eric J. Schmidt

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Counsel for Petitioner

May 24, 1974

APPENDIX A.

1. Judgment and Order of the U.S. District Court for the Northern District of California

2. Findings of Fact and Conclusions of Law of the U.S. District Court for the Northern District of California

[illegible]
[illegible]
[illegible]
[illegible]
Telephone: [illegible]

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FATHER P. CLARK,	)	
	)	
Plaintiff,	)	No. 49603 - SC
	)	
vs.	)	FINAL JUDGMENT
	)	
[illegible] LINES,	)	
	)	
Defendant.	)	

This action came on to be tried in part by a jury and in part by the Court. Evidence offered by the parties having been heard, and the jury having brought in its verdict, and the Court having made its Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED AND DECREED that the plaintiff, FATHER CLARK, recover from the defendant the sum of Two Thousand Dollars ($2,000.00) on his claim for the neglect and refusal of the vessel to provide him with medical care, but that plaintiff take nothing, and that the suit be dismissed as to plaintiff's claim for damages for malicious prosecution, personal injury and his claim for recovery of his wage deduction, and for the imposition of the double wage penalty, and that [illegible] costs of action.

Dated: August 27, 1971.

[illegible]
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICK D. GEARIN, Plaintiff, -vs- WEYERHAEUSER LINE, Defendant.	No. 49993 - SC FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This suit is a seaman's maritime action and was brought pursuant to and under the Jones Act, 46 U.S.C.§688 and the general maritime law.

2. At all material times defendant, WEYERHAEUSER LINE, owned and operated the SS C.R.MUSSER, an American merchant vessel.

3. Plaintiff, PATRICK D. GEARIN, was an American merchant seaman serving aboard the SS C.R.MUSSER as an ordinary seaman.

4. The plaintiff signed aboard the SS C.R.MUSSER on December 14, 1967. On that same date he was given a physical examination and declared fit for duty.

5. On December 23, 1967, at approximately 1800 hours, the plaintiff fell on the SS C.R.MUSSER sustaining an injury to his right foot.

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6. Upon arrival in Da Nang, Vietnam, on January 19, 1968, the plaintiff was put abord the first launch and sent to the Navy hospital in Da Nang for examination and X-rays. At this time the vessel was at anchor in Da Nang Bay.

7. The plaintiff was examined at the Navy hospital and the diagnosis was a "contusion" of the right foot. The X-rays revealed no fracture. The plaintiff was declared not fit for duty for two weeks.

8. On February 1, 1968, the vessel was moved from its anchored position offshore to a pier in the port of Da Nang. During the time from January 19 to February 1 the plaintiff remained ashore, going back to the vessel only to pick up his money draws.

9. On February 1, 1968, Captain Wheeler ordered the plaintiff to report aboard the vessel to the Chief Mate every duty morning. At the time the order was given, the Tet offensive was under way and there was heavy Viet Cong and terrorist activity in the area in and around Da Nang. The plaintiff disobeyed the order to report aboard while the vessel was in Da Nang and continued to disobey said order on subsequent days.

10. On February 3, 1968, the vessel sailed for Hong Kong with the plaintiff aboard. Upon arrival in Hong Kong on February 6, 1968, the plaintiff left the vessel on the first launch to have his foot examined by a Dr. Watson. He left with all of his personal belongings. Dr. Watson found a hairline fracture of the right foot. However, plaintiff never reported these findings to the Captain and

never talked to the Captain after leaving the vessel initially. The plaintiff's medical expert, Dr. Welke, examined the same X-rays which Dr. Watson took and concluded that there was no fracture.

11. While in Hong Kong, Captain Wheeler observed the plaintiff walking down one of the main thoroughfares with his cast off and with shoes on both feet. The Captain concluded that the plaintiff was not seriously injured.

12. The MUSSER left Hong Kong for Naha, Okinawa, approximately eight hours after arrival on February 6, 1968. The plaintiff was not aboard the vessel when it sailed from Hong Kong. A deck log entry noting this fact was made by the Chief Mate.

13. Plaintiff was flown to Naha, Okinawa, to meet the ship on February 9, 1968. The defendant's agent advanced the cost of transportation.

15. The vessel arrived in Naha on February 11, 1968. However, the plaintiff did not report aboard until the late evening of February 14, 1968. Thus, the plaintiff was not aboard the vessel from February 6, when he left the vessel in Hong Kong, through February 14, a total of nine working days.

16. On February 14, 1968, when the plaintiff talked to the Captain, the Captain asked the plaintiff why he had not reported aboard as ordered and the plaintiff stated that he "did not feel like it." The plaintiff was ordered to stay aboard the vessel during working hours as he was still a member of the ship's crew. The plaintiff failed to tell

the Captain on the evening of the 14th that arrangements had already been made to repatriate the plaintiff to the United States.

17. On February 15, 1968, the Master prepared certain log entries, two of which were disciplinary fines. The plaintiff was fined four days' wages for continued refusal to obey the direct order. In addition, a notation was made in the official log that $137.40, or nine days' wages, would be withheld from the plaintiff's base wages since he had not been aboard the vessel from February 6 through February 14.

18. After preparing the log entries, the Captain made an attempt to locate the plaintiff. The Captain went to the U.S.Consul in Naha where he was to meet the plaintiff. The plaintiff did not appear and the Captain left the log entries with the U.S.Consul. It was at this time that the Captain learned that the plaintiff was being repatriated.

19. The sum of $160.00 for air fare from Hong Kong to Okinawa and for hotel and living expenses in Hong Kong was deducted from the plaintiff's wages.

20. The Court finds that the Captain had sufficient cause for all of the deductions and withholdings made from plaintiff's wages.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to and under the Jones Act and general maritime law.

2. The defendant sustained its burden of proof with reference to the certain deductions and the burden shifted to plaintiff of proving by a preponderance of the

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evidence that the wage deductions or withholding were improperly or illegally made. This burden on the part of the plaintiff has not been met.

3. The $61.07 deduction for refusal to obey a direct order, and the $61.07 deduction for continued refusal to obey the direct order, were lawful and properly entered in the official log.

4. Because he was not aboard the vessel for nine days from February 6 through February 14, 1968, the plaintiff was not entitled to wages for those days, and the $137.40 withholding for failure to be aboard the vessel was legally and properly made.

5. The deduction of $160.00 for living expenses incurred in Hong Kong and for air fare from Hong Kong to Naha, was legally and properly made.

6. Plaintiff is entitled to receive damages in the amount of $2,000.00 under the Jury's verdict for the failure and refusal of the defendant to provide plaintiff with necessary medical care.

Let the judgment be entered accordingly.

Dated: July 26, 1971.

United States District Judge

APPENDIX B.

Decision of the U.S. Court of Appeals for the Ninth Circuit

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PATRICK D. GEARIN, *Plaintiff-Appellant,* vs. WEYERHAEUSER LINE, *Defendant-Appellee.*	No. 71-3026 MEMORANDUM

[January 21, 1974]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, WRIGHT, and WALLACE, Circuit Judges.

Appellant, Patrick Gearin, a seaman, appeals first, from an adverse jury verdict with respect to his claim for damages for malicious prosecution, and second, from the District Court's Findings of Fact and Conclusions of Law (R. 265) (which settled the dispute over adjustments of the seaman's wages by the captain and operation of the double wage penalty, 46 U.S.C. §596), in favor of the appellee, Weyerhaeuser Line. The jury's verdict awarding $2,000 to the appellant for his claim of inadequate medical care, is not at issue on appeal.

Federal jurisdiction is predicated upon 46 U.S.C. §688. A factual review of the events leading up to this appeal are concisely summarized in the findings of the District Court (R. 265).

The appellant's contentions are, for the most part, that he disagrees with the trial judge's evaluation of witness's testimony as to the wage adjustments, and disagrees with the jury verdict on the malicious prosecution issue.

Contrary to appellant's contentions, this case is purely a "fact appeal" (Appellant's Reply Brief, p. 10), and the standard of

review for this Court is governed by the "clearly erroneous" rule. Fed.R.Civ.P. 52. For this Court to reverse the trial court, we must find that the trial court's findings were clearly erroneous. As stated by the Supreme Court in *United States v. Oregon State Medical Society*, 343 U.S. 326,

> "There is no case more appropriate for adherence to this rule than one in which the complaining party creates a vast record of cumulative evidence as to long past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."
>
> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395." 343 U.S. at 339.

Upon reading the record on appeal, the various depositions and exhibits referred to by appellant and appellee in their briefs, we cannot conclude with any conviction that any reversible error has been committed by the trial court or jury. Appellant's claims on appeal do not compel us to find that the "clearly erroneous" standard has been met, and we affirm the trial court's findings, except in one particular hereinafter mentioned.

I. *FACTS*

The principal facts are briefly described in the margin.[1]

---

[1]The plaintiff was 37 years old and 6'6" tall when he went to sea. Three days out of Portland, he slipped on a stairway on the ship, hurt his foot, and was put in the ship's hospital for one day and then was put back in his quarters, given some Epsom salts for soaking his foot and a heating pad. The captain came to see him promptly, gave him some codeine for the pain, but did not give Gearin as much as he wanted. At that point, Gearin argued with the captain and developed an intense dislike for him. (R.T. 62). Gearin had been a troublemaker. Two days before the accident, at 3:00 in the morning, he had been drunk and awakened others. The voyage to DaNang took two weeks or more and Gearin performed no duties aboard. He went ashore at DaNang but had no permission to stay there. There was nothing to prevent his staying aboard ship, but he sat on the beach and drank beer and visited aboard other ships. (R.T. 66). When his own ship came to the pier, he went aboard for the first time in five days and then only to draw some money.

II. *WAGE ADJUSTMENTS*

The trial court found that Captain Wheeler's wage adjustments were legally and properly made, namely: (1) A $61.07 deduction for refusal to obey a direct order (46 U.S.C. §701, ¶4), and a $61.07 deduction for continued refusal to obey the direct order (46 U.S.C. §701, ¶5); (2) a $137.10 withholding of wages that the seaman was not entitled to for not being aboard the vessel for nine days from February 6 through February 14, 1968 (46 U.S.C. §701, ¶3); and (3) a deduction of $160.00 for living expenses and air fare. This sum was paid appellant, and is not in dispute. Appellant asks for restoration of wages which he claims were illegally withheld, together with wages from March 14, 1968 to date; and that this Court invoke the double wage penalty (46 U.S.C. §596) to the tune of $38,327.70.

As to the illegal withholding claim, appellant argues that the case of *Isbrandtsen v. Johnson*, 343 U.S. 779 (1952) stands for the proposition that no wages may be withheld for any contract obligations not listed in the statutes. We agree that the Supreme Court in *Isbrandtsen* concluded that only such deductions and set offs can be made against the wages of a seaman as are recognized specifically by statute;—such as the fines and forfeiture listed in 46 U.S.C. §701, when the deductions are for disciplinary

---

The captain told him to report aboard daily. He had been drinking beer but said he was not drunk. He was quite mad at the captain. (R.T. 68).

He left the ship at Hong Kong, not intending to return, but did not tell that to the captain. The ship left without him. (R.T. 71).

The local agent for the vessel bought him a ticket from Hong Kong to Naha in Okinawa where he arrived ahead of the ship. He stayed in a hotel there at the expense of the ship owner, drinking. His foot was x-rayed but no fractures were discovered, but he thought the doctor should have done more for him. (R.T. 73).

He did not report aboard ship, although he was still a crew member. He was ashore in a hotel for three or four days. Finally, he went out to get more money. The captain asked why he did not report aboard, and Gearin said he just did not feel like it. (R.T. 79). The captain told him to report to the ship the following day. He did not and instead he flew home to San Francisco. (R.T. 91).

He reported into the Public Health Hospital in San Francisco, was treated for a few days, was told to return, and did not. In a couple of weeks he was engaged in a fight with another seaman and broke two ribs. The next month he was hit in the nose with a glass thrown by a girl in a bar (R.T. 97-98).

purposes. "Only such deductions and set offs for *dereliction in the performance of his duties* shall be allowed against his wages as are recognized in the statute." 343 U.S. at 687. (Emphasis added.) However, other deductions not expressly provided for in §701 are also allowed, such as Federal income tax, social security, slop accounts debits and money advanced.

Here, the two $61.07 deductions are covered by statute, 46 U.S.C. §701, ¶¶ 4 and 5, and the evidence disclosed that the seaman disobeyed the order given by the captain on February 1 by failing to report on February 13 and 14, for which the Captain was justified under the statute to deduct four days pay; and for continued wilful disobedience to a lawful command on February 15, deducting another four days pay.

The trial court found that the seaman was not aboard the vessel (Findings 12, 5, 17, Conclusions No. 4), and did not earn wages during nine days. The court did not use the words "failure to join" as in 46 U.S.C. §701. Appellant correctly contends that if plaintiff had in fact been found guilty of failure to join in its statutory sense, and if the forfeiture had been imposed in the manner provided by law, only two days pay could have properly been deducted. §701, ¶2. But the court did not find the seaman guilty of failure to join, simply that the *wages were not earned by the seaman*. Reading the Wheeler deposition (Vol. II, p. 4), Captain Wheeler's intent as to his deduction for the nine days wages evidently satisfied the trial court's belief that such deduction was not for the statutory offense of failure to join and we find nothing in appellant's argument causing us to hold such a finding by the lower court "clearly erroneous". (Wheeler Dep. Vol. II, pp. 110-111).

The $160 deducted from Gearin's wages for air fare from Hong Kong to Okinawa and for hotel and living expenses in Hong Kong is one deduction made by Captain Wheeler, in which we must disagree with the trial court's finding (Conclusion 5), at least as to the legality of withholding the $160. However, this is of no consequence, for it is uncontradicted appellant later was paid this amount.[2] *M. Norris, Law of Seamen*, Vol. I, §565 at 437 (3d ed. 1970).

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[2]See Appellant's Brief, p. 68, Note 25.

We turn to whether the illegality of the withholding requires the double wage penalty to be applied. The provision of the double wage penalty states:

> "Every owner or master who refuses or neglects to make payment . . . *without sufficient cause* shall pay to the seaman a sum equal to 2 days pay for each and every day during which payment is delayed. . . ." (Emphasis added.)

Thus, to invoke the double wage penalty, we must find that Captain Wheeler did not have "sufficient cause" to withhold the payment. In *The Thomas Tracy*, 24 F.2d 372, 374 (2d Cir. 1928), it was stated:

> ". . . although it may ultimately be determined that there is no actual legal defense to the claim for wages, nevertheless, if the owner or master had sufficient cause to withhold the wages when demanded, beyond the time mentioned in the statute, it relieves the vessel of the imposition of the penalties."

The captain's failure to pay amounts withheld must be shown to be "arbitrary, wilful, or unreasonable." *McCrea v. United States*, 294 U.S. 23, 30-31 (1936). If the Captain's withholdings can be justified on his good faith and reasonable belief, sufficient cause can be found. *Cf. Collie v. Ferguson*, 281 U.S. 52, 56 (1930).

We agree with appellee that Captain Wheeler's testimony was judiously believed by the trial judge in finding that the captain had sufficient cause for all of the deductions and withholdings made from Gearin's wages (Finding 20), and appellant's argument has not produced anything indicating that Captain Wheeler's state of mind was "arbitrary, wilful or unreasonable." Thus, the captain was justified and clearly established "sufficient cause" to block application of the double wage penalty, as was found by the trial court.

III. *MALICIOUS PROSECUTION*

Appellant claims that the jury verdict on the question of malicious prosecution was improper and argues the elements for malicious prosecution were met. (Appellant's Brief, pp. 33-38). However, appellant's contentions, to a great degree, are unsupported by the record, and facts are slanted by appellant to sup-

port his argument. Upon reading the record, we fail to find any substantial evidence that would require us to overturn the jury verdict.

IV. *APPELLANT'S CONTENTION THAT THE COURT ERRED IN ITS FINDINGS*

Once again relying on his interpretation of the facts as against the trial judge's findings, appellant attacks with particularity Findings 6, 7, 9, 10, 11, 12, 15, 16, 18, 20, and Conclusions 2, 3, 4, and 5 on various factual points. Most of his contentions have little merit, and are aptly refuted by appellee in its brief. Appellant's contentions fail to convince us, upon our reviewing the entire record, that the trial court made a mistake in its findings, with one exception hereinafter discussed.

Appellant's inferences of bias of the trial judge (Appellant's Brief, pp. 50, 65) are unfounded, and completely uncalled for. In certain instances, appellant edits the record, taking a particular passage out of context.[3]

Appellant is correct that the trial court mistakenly termed Dr. Welke, the "plaintiff's" medical expert, in Finding 10 (Tr., pp. 461-463), but such a mistake can hardly be termed prejudicial, since the jury verdict preceded the trial court's findings.

Finding 11[4] is disputed because of an alleged variation in Captain Wheeler's description of observing the plaintiff walking with his cast off, and shoes on both feet. However, the variation is only minor as to the captain's position at the moment of sighting the seaman. Furthermore, Captain Wheeler's deposition does not

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[3]For example, as to Finding 9 that the seaman disobeyed the order to report aboard the vessel in Da Nang, appellant contends that the finding ignored the question: "Can a crippled crewmember legally be required to report aboard ship daily at the risk of his life for no purpose other than to gratify the ship master's ego?" (Appellant's Brief, p. 51). He quotes incompletely from Captain Wheeler's deposition to support this inflammatory contention. (See Appellee's Brief, p. 10 for a more complete quotation.)

[4]Finding 11 reads:

"11. While in Hongkong, Captain Wheeler observed the plaintiff walking down one of the main thoroughfares with his cast off and with shoes on both feet. The Captain concluded the plaintiff was not seriously injured."

support appellant's allegation that the captain admitted one of the shoes was a native straw device. As appellee correctly states, "The only mention by the captain of any shoe worn on the seaman's right foot is a description of a 'short boot . . . with a reverse cast on it.'" (Wheeler's deposition, Vol. I, p. 34). Also, Finding 11 was relevant to the issue of sufficient cause as to the wage adjustments, and not irrelevant, as appellant contends.

Appellant urges error with regard to costs; with the court's refusal to allow the appellant's attempt to testify to state the law; and finally, that the court abused its discretion in excluding records of the Coast Guard Examiner and testimony regarding the gangway accident.

The issue of costs is within the discretion of the trial court. *Homestead Mining Co. v. Mid-Continent Exploration Co.*, 282 F.2d 787, 804 (10th Cir. 1960); *K-S-H Plastic, Inc. v. Carolite, Inc.*, 408 F.2d 54 (9th Cir. 1969). There was no abuse of discretion in the trial judge's refusal to allow in evidence the seaman's conclusion as to what the law was.

The Coast Guard proceedings were properly excluded by the trial judge, since hearsay objections were inherent. Appellant, on the authority of *O'Kon v. Roland*, 247 F.Supp. 743 (S.D. N.Y.), argues that records of Coast Guard hearings have always been admitted in District Court Proceedings (Appellant's Brief, p. 40). But O'Kon is easily distinguished as it concerned the scope permitted to a District Court in reviewing on appeal Coast Guard findings, whereas here the District Court sat as a court of original jurisdiction. As to the testimony regarding the gangway accident, the court ruled such testimony lacked relevance in this trial. We agree.

V. *CONCLUSION*

In summary, we hold that the "clearly erroneous" proof standard as applied to appellant's contentions have not been met by him, and we affirm all the trial court's findings, and conclusions, except that we reverse all of Conclusion of Law 2. While it first states: "The defendant sustained its burden of proof with reference to certain deductions," the words "certain deductions" do not tell us, or the litigants, whether the burden of proof of *all* deductions was sustained by the defendant.

> Nor can we agree with the balance of Conclusion of Law 2, ". . . and the burden shifted to plaintiff of proving by the preponderance of the evidence that the wage deductions or withholdings were improperly or illegally made. This burden on the part of the plaintiff has not been met."

While it may have been the intent of the conclusion to state that "the burden of going forward shifted to the plaintiff," the burden of proof did not. *Payne v. S.S. Tropic Breeze*, 274 F. Supp. 324 (D.P.R. 1967); *Butler v. United States War Shipping Administration*, 68 F.Supp. 441 (E.D. Pa. 1946); *Carson v. Gulf Oil*, 1963 A.M.C. 1030.

We also strike from the Findings of Fact, No. 19, and from the Conclusions of Law, No. 5, each as moot.

We remand to the District Court for the making of a new finding on the burden of proof; either with or without the taking of additional evidence and/or a hearing.

Otherwise, the judgments are affirmed in all particulars. Each side is to bear its respective costs.

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APPENDIX C.

New Finding on Burden of Proof on Remand

ORIGINAL
FILED

FEB 8 - 1974

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PATRICK D. GEARIN,	)	
	)	
Plaintiff,	)	
	)	No. 49993 - SC
-vs-	)	
	)	
WEYERHAEUSER LINE,	)	
	)	
Defendant.	)	

This case is remanded for the making of a new finding on the burden of proof.

The Ninth Circuit has indicated that this court's Conclusion of Law 2 has left some uncertainty as to whether defendant had sustained his burden of proof as to all deductions as issue. With due respect to the Appellate Court, this court finds no such uncertainty in the wording of Conclusion of Law 2. Unfortunately, that conclusion of law, as misquoted by the Ninth Circuit, is indeed ambiguous; as written, the meaning is clear. Conclusion of Law 2 was quoted as stating: "The defendant sustained its burden of proof with reference to ( ) certain deductions." The language of this court included ".....the certain deductions", which undoubtedly refers to all

deductions at issue.

However, to clarity further, this court re-writes Conclusion of Law 2 as follows:

> 2. The defendant sustained its burden of proof in clearly establishing that sufficient cause existed for all deductions and withholdings.

The point that ambiguity exists in this court's previous Conclusion of Law 2 with reference to a shift of burden, is well taken. It was nowhere intended that the burden of persuasion shift to plaintiff. Defendant has properly carried throughout and has satisfied that burden. Conclusion of Law 2 shall, therefore, be entered as written above.

Dated: January 25, 1974.

Edmund Port
United States District Judge

APPENDIX D.

Petition for Rehearing

NO. 71-3026

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK D. GEARIN,

Plaintiff and Appellant,

vs.

WEYERHAEUSER LINES,

Defendant and Appellee.

On Appeal From the United States District Court For the Northern District of California

APPELLANT'S PETITION FOR REHEARING

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Shipping Commissioner's Act of 1872 3

NO. 71-1026

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

PATRICK D. GEARIN,

Plaintiff and Appellant,

vs.

WEYERHAEUSER LINES,

Defendant and Appellee

On Appeal From the United States District Court for the Northern District of California

APPELLANT'S PETITION FOR REHEARING

POINTS OF LAW AND FACT WHICH PETITIONER BELIEVES THE COURT OVERLOOKED OR MISAPPREHENDED

None of the Facts in the Wage Claims are Disputed

The Court states:

> "The appellant's contentions are, for the most part, that he disagrees with the trial judge's evaluation of witnesses' testimony as to the wage adjustment . . ." (Emphasis added.)

> "This case is purely a 'fact appeal' . . ."

Appellant feels that even a cursory review of the record will show that: 1) none of the facts essential to the wage issues are in dispute; 2) the only questions presented are those of law; 3) the clearly erroneous rule regarding fact issues has no application to the wage claims in this case.

I

The DaNang Withholding

Facts:	Proven By	Appellant's Position
1. Earned wages were withheld by the master at the time of a wage advance to the seaman in DaNang. F.N.	Shipowner at trial	Affirms the fact
2. The purpose for withholding said wages was to repay the shipowner for money it had spent for the seaman's hotel in that port.	Shipowner at trial	Affirms the Fact

The above facts suffice, by themselves, to show whether or not an illegal seizure of wages occurred.

Was the admitted purpose for the withholding one of those permitted by Congress?

Allotment	No
Wage advance	No
Slop chest	No
Fines under Section 701	No
Penalties (Sects. 659, 665, 707)	No
Tax deductions	No

Was any log entry made concerning this wage taking? No.

Only one conclusion is possible under the law: the wage withholding violated the statutes and the settled case law. Tit. 46 U.S.C.A., Sects. 600, 601, 602. Isbrandtsen v. Johnson, 72 S. Ct. 1011, 343 U.S. 779. Section 602 appears to have been intended by Congress as a "back-up" law to prevent loop-hole treatment of the other sections.

F.N. The amount is not relevant on the issue of liability for the Section 596 penalty.

Yet the trial court decreed that withholding of those wages was legal and this Court has affirmed that decision.

The shipowner has never been asked by either court to justify this withholding on any ground other than that it was legal.

The separate question of whether or not the asserted debt was a valid one, enforceable against the seaman, cannot be decided unilaterally by the shipowner--but must be determined by an impartial court. A seaman is as much entitled to due process before being deprived of his property as is any other citizen. The enactment of the Shipping Commissioners Act of June, 1872 restored this basic right to seamen after years of denial under the harsh rules of the general maritime law. Under the statutes comprising that Act, no taking of wages to satisfy any claim or debt asserted by the shipowner is permitted, even where the seaman agrees to it. Sect. 600. The mere coincidence that the shipowner has possession of the seaman's wages does not create any rights in the shipowner superior to other creditors of the seaman.

At a later due-process hearing on the shipowner's claim, to be initiated by the shipowner after all wages have been paid in accordance with law (Sect. 596), the undisputed facts will show that the seaman was a physically disabled member of the ship's crew, wearing a cast, at the time the hotel bill accrued.

At said hearing it will become perfectly clear that providing the disabled plaintiff with the hotel room was a part of the shipowner's duty of providing maintenance and cure which

vessels have owed for centuries to members of their crews who fall sick or become disabled while in the service of the vessel. That the seaman was disabled is undisputed. That the seaman was in the service of the vessel when he became injured has never been, and cannot be, challenged. He fell on a ladder while the ship was in heavy weather on the high seas.

But even were the due-process hearing to result in a finding that the seaman owed the money claimed, the resulting judgment could not be enforced against his earned wages. (Sect. 601.)

There is no possible way under the law that the taking of wages which was effected in DaNang, the occurrence of which, and purpose of which, were proven by the shipowner and undisputed by the seaman, can be legal. And the enforcement against wages of a "private judgment" of the master's was a further violation of law, an act in excess of any power possessed by the courts.

There is no question here concerning any disagreement "with the trial judge's evaluation of witnesses' testimony" or "credibility of witnesses." The testimony of the master, and the records made by the defendant confirming both the occurrence and purpose of the wage-taking are declared by the seaman to be true and accurate.

The sole point of contention concerns the law which governs these undisputed facts. The appellant claims that an error of law was made below, and that this error has not yet been corrected in this Court.

To correct the error below, there is no need for this Court to find the trial court's findings erroneous in any respect where they are concerned with facts.

Appellant believes that the language in this Court's present decision, quoted below, is not applicable.

> "There is no case more appropriate for adherence to this rule than one in which the complaining party creates a vast record of cumulative evidence as to long past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses."

This comment has no application where no dispute exists concerning a single material fact and that is the situation with respect to all of the wage claims presented by this case.

II

Hong Kong - Okinawa Withholding

	Facts:	Proven by	Appellant's Position
1.	Earned wages in the amount of $160.00 were withheld at the time the seaman was paid off in San Francisco	Shipowner on master's wage voucher	Affirms the fact
2.	The purpose for the withholding was to repay the shipowner for money it had spent for the seaman's lodgings, food and transportation between Hong Kong and Okinawa	Shipowner on master's wage voucher	Affirms the fact

Approximately eight months after suit had been filed, the shipowner admitted the illegality of this wage withholding and paid the sum involved to the seaman ($160.00).

At the time it paid, although it admitted the illegality of its conduct, the shipowner refused to pay any part of the

penalty which had accrued during the waiting period.

The Court below, despite the defendant's admission, held that the withholding was legal and for that reason no penalty was owed. This Court has reversed, declaring the withholding to be illegal, but has affirmed the lower court's finding that no penalty is owing. Since the lower court's only ground for denying the penalty-legality-has been invalidated, there was and is no existing ground for this Court to affirm.

Under the rule laid down in Gerber v. Spencer, 278 F.866 (D.C., Cal., 1922) the refusal to pay accumulated penalties constitutes a refusal to pay the full amount owing (the penalties have been specifically declared by the courts to be wages)--and the penalty continues to accrue after the net wages have been paid. This rule has been followed in other circuits (Appellant's Brief, p. 66.)

Under this rule, the penalties for this second withholding continued to accrue until the District Court's decision stopped them.

No dispute of fact exists with respect to this wage withholding. The sole point of contention concerns the law which governs the undisputed facts. The appellant respectfully urges that there cannot be sufficient cause for withholding wages for a purpose which has never been legal and which clearly violates one of a seaman's most ancient and basic rights: the right to maintenance and cure when he is injured abroad.

If a shipowner is permitted by the courts to flagrantly

violate the most ancient and settled rights of seamen without fear of a penalty, if all that is required from the violator is that he pay only the wages which should have been paid years earlier--before suit was filed--then the seaman's statutory rights are truly nothing but ink on paper! When the enforcement of rights results in no financial loss to the employer, the statutes preserving those rights are not going to be enforced--and the purpose for their existence might just as well be forgotten.

III

The Present Decision Leaves Unanswered Important Questions of Law

A. When a seaman's wages are forfeited by a master acting under the authority of Sect. 701 (i.e., the wages are permanently diverted to the shipowner's use on the basis of nothing but the master's unilateral decision) and at a later, formal hearing before a U.S. Coast Guard Examiner it is officially determined that the forfeiture of wages was illegal--is not the seaman entitled to the immediate restoration of the wages in question? Can the shipowner totally ignore the entire administrative procedure and refuse the seaman's demand to be given back his wages?

That is exactly what has happened in this case. The U.S. Coast Guard found that the charges of misconduct with which the plaintiff was charged in the Official Log were not proved and that all of the log entries on which all of the forfeitures were grounded were illegal. Yet the shipowner retains today all of the wages taken from the seaman under the color of Sect. 701, for "offenses" unilaterally declared by its private employee to have

been committed, but declared by the Coast Guard's judicial officer after an impartial hearing, not to have been committed. The master's ruling is given priority over the Coast Guard's. At the same time the master in this case, who apparently is familiar with the confiscatory provisions of the statutes but not the protective provisions, seeks the tolerance and forgiveness of the courts for his "good-faith" ignorance of a basic seaman's right which, since the beginning of recorded maritime law, has forbidden a master from taking an injured seaman's wages to defray the costs of maintaining and curing him.

A question that deserves an answer from this Court is this: how much ignorance of the law can be excused in a ship's master who is exercising and applying the punitive portions of the statutes and ignoring the protective aspects? Another fair question in this case is: how well settled must the law be before a master will be required to know it or subject his employer to the penalty for its violation? The law against enforcing even court judgments against seamen's wages has been in effect since 1872. The law against a master taking a seaman's wages to pay for his maintenance and cure has been a part of the maritime codes since 600 A.D. (Rhodian Laws); it was old in the 13th century (Rules of Oleron) and was ancient in the 16th century (Laws of Wisbuy, Laws of the Hansa Towns).

B. Is a seaman without power to terminate his employment contract with the vessel?

The appellant believes that the constitutional prohibition

against involuntary servitude ensures that all U.S. citizens possess the power to terminate an employee relationship at will. If a seaman who terminates his employment relationship breaks his contract in the process, or violates a statute prohibiting desertion, that fact may or may not result in liability of some kind, but it would seem clear that nothing can prevent the termination of his employment if he wills it.

The seaman in this case determined to terminate his employment in Hong Kong. Incidentally, he claims he had the right to do so, as well as the power, but that is not the question at the moment. The question is: did he remain subject, after his demonstrated renunciation of the employment contract, to the commands of the vessel's master?

Did he continue to be subject to punishment for failure to perform the duties of an employee?

Even if we ignore for the moment the fact that he was indisputedly disabled from all work--and that he had placed himself in the custody and care of the company's agent--isn't it a necessary legal conclusion that he could terminate his employment and that he clearly did so, that he was no longer an employee of the vessel after he quit it in Hong Kong? If he was not an employee in Okinawa, all fines for refusal to carry out the master's orders were totally improper. A clear ruling on the seaman's status after he quit his vessel in Hong Kong is both desirable and necessary to the decision of the issues.

Other questions need to be answered concerning the

forfeiture of wages for disobedience of a direct order.

The order underlying the charged offense was for the seaman to report aboard the ship every day.

The order was given in the port of DaNang. (Undisputed.)

The order is alleged to have been disobeyed in the port of Okinawa. (Undisputed.)

The particular offense alleged to have been committed is the "disobedience of a lawful command at sea," Sect. 701 (Fourth and Fifth).

QUESTION: Is an order which is given in a port, to be performed in a port, the same as an order given at sea for purposes of this statute? It is obvious that unless this Court answers this question affirmatively, there was no violation by the seaman of Sect. 701 (Fourth and Fifth) and the fines taking a large amount of earned wages at a punitive rate were illegally imposed.

The shipowner here claims the right to effect a withholding of wages which is not provided for by statute. This is simply to "stop" them.

The irrefutable fact established by the shipowner's own records, is that the seaman's wages were not stopped. (Appellant's Closing Brief, p. 7).

But the notion that nine days' pay can be withheld for some offense not specifically listed in Sect. 701 is not valid. Isbandtsen. "Stopping" wages is merely a euphemism for forfeiting wages. In the present case the shipowner took back the nine days'

wages, but left the seaman with the income tax and other deductions on the wages. Wages not paid cannot be taxed. The decision in this case should clearly approve or reject the "stoppage" claim of right.

CONCLUSION

The most important aspect of the entire Congressional plan to extend protection to seamen's wages is the provision for the waiting-time penalty under Sect. 596. No fact is more obvious than this: unless the penalty is applied where illegal conduct is proven, there is no risk to deter wrongdoers; and there is no practical way for the seaman to seek the help of the courts.

If a seaman who finds himself victimized by a shipowner goes into the courts to enforce his statutory rights--and wins--but gets only the wages that had been illegally kept from him, then he loses! Only the award of the double-wage penalty permits the wage statutes to have meaningful existence. And after a few years of court refusals to award penalties, the seaman will find it impossible to procure assistance of counsel to seek his remedy for him. This appears to be the answer to why wage awards which are not tied to personal injury claims are practically unheard of on the Pacific Coast.

If the courts meet a clear violation of the wage statutes with the prescribed penalty, the seaman will be able to seek his remedy and the laws will serve their purpose.

If the courts take the view that proving the illegal nature of the taking is merely a preliminary requirement to being

allowed to proceed to the serious proof that the taking was willful, malicious, outrageous and an act that shocks the community, seamen will almost never prevail against captains.

The burden is not on the seaman to prove malice and unconscionable conduct. He cannot hope to do this. The burden is on the shipowner to justify its taking of the wages. If a mere declaration of a good-faith belief that the law was something else is going to be accepted as sufficient cause, the penalty provision is devoid of value.

The seaman has no official logs to put forward to show the master is a "trouble maker." He totally lacks the prestige and the polish of the adversary. If the seaman drinks, that fact is usually magnified to blacken him, even though his drinking is not an issue and even though the master, as here, carried his own liquor stocks with him and it may reasonably be presumed that the various consular, Coast Guard and company representatives also drank.

In the present decision, instances of the seaman's conduct are recited in the footnote facts to cover barroom incidents which occurred several months after he had been discharged from the hospital in San Francisco, and long after the last incident which had the slightest relevancy to his wage rights had been completed. The appellant's drinking is referred to repeatedly by both courts, but his drinking was never an issue. Even a drunkard (which appellant was not) is entitled to the full protection of the wage statutes.

Appellant respectfully petitions this Court for a rehearing in the light of the explanation provided above.

DATED: February 4, 1974.

Respectfully submitted,

ERIC J. SCHMIDT
Counsel for Appellant

APPENDIX E.

Order Denying Petition for Rehearing

FILED

IN THE UNITED STATES COURT OF APPEALS 1974

FOR THE NINTH CIRCUIT CLERK U. S. COURT OF APPEALS

PATRICK D. GEARIN,
Plaintiff-Appellant,
v.
WEYERHAEUSER LINE,
Defendant-Appellee.

No. 71-3026

ORDER DENYING PETITION FOR REHEARING

RC-4493 :C)

Before: BARNES, WRIGHT and WALLACE, Circuit Judges.

This court's memorandum, filed on January 21, 1974, remanded the cause to the District Court for the limited purpose of clarifying portions of that court's findings and conclusions. By its order of January 25, 1974, that court has accomplished what was requested. Its Conclusion of Law No. 2 has been rewritten and entered and the District Court has correctly stated that the defendant had the burden of proof and sustained that burden.

The appellant's Petition for Rehearing has been considered, and is denied.

FPI-Bandstone
1-18-71-75M-8066

APPENDIX F.

Illustrative News Item

Appendix F

(Illustrative of Footnote (a) p. 24)

Timely notice means cash to seamen

Along the waterfront

By H. W. Kusserow

U.S. seamen around the world are hailing Don L. Rotan as an off-season Santa Claus.

Rotan is the slightly rotund editor of "Stewards News," the publication of the Marine Cooks & Stewards Union here.

Like other maritime unions, the MCS recently received a list of the names of seafaring union members who had back pay coming for service on merchant ships during the height of the Vietnam sealift from 1965 to '69.

Nearly $300,000 held by the U.S. Treasury was waiting to be claimed, the government said.

Of the eight unions receiving the information, only Rotan and the MCS did something concrete about it. Don L. began printing the list of names, with a code for the companies involved, social security numbers and amount due.

It will take him until the May 24 issue of Stewards News to run the entire list of some 5500 names — some duplicated because of services on more than one ship.

But his effort already has paid off handsomely for many of the men — perhaps up to 1000 who have anywhere from $1 to $1000 coming.

"One retired purser," he said, "saw his name and collected $925.

"It probably will take six months or more for some of the fellows who are traveling the world to come ashore and learn they have back pay coming," he estimates.

Men who sailed for 11 companies involved in the sealift under government contract have money coming. But they are warned not to apply to the company — or their union — but the Maritime Administration's Division of Accounts, Washington, D.C. 20320.

Claims must include name, address, social security number, company employed by and name of ship and dates served if known.

To make it easy, Rotan is publishing an application form in each issue.

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San Francisco Examiner
May 6, 1974

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petition for Writ of Certiorari with accompanying Appendix upon Frederick W. Wentker, Jr., Esquire, of the law firm of Lillick, McHose, Wheat, Adams & Charles, 311 California Street, San Francisco, California, counsel for Respondent, by depositing same in the United States mail, postage prepaid, first class, this 29th day of May, 1974.

Eric J. Schmidt

ERIC J. SCHMIDT
Counsel for Petitioner